**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION.**

**CIVIL APPLICATION NO.3570 OF 2005**

**IN**

**FIRST APPEAL STAMP NO 18270 OF 2005.**

The Municipal Corporation of
Greater Mumbai : Appellants.

versus

Smt.Hiraben Motilal Shah
& Anr. : Respondents.

Mr.A.Y.Sakhare with Mr.J.J.Xavier for the Appellants/BMC.

Mr.S.G.Anney with Mr.S.A.Vaidya for Respondent No.1.

Mr.S.Menon for Respondent No.2.

**CORAM : D.G.DESHPANDE,J.**

**DATED : 13th September 2005.**

**ORAL ORDER**

1. Heard advocates for the appellants in this application for condonation of delay of 3 years and 33 days and, the advocates for the Respondent No.1/original plaintiff and, the advocate for Respondent No.2 who supported the corporation in the suit filed by the plaintiff/respondent No.1 before the trial court, and also supporting the appellants in this appeal and the application.

2. It was argued by Mr.Sakhare appearing for the BMC that in a suit there were two respondents i.e. the BMC as well as the owner of the property who came to be joined as Defendant No.2 on his own application. The action of the BMC was in respect of unauthorised construction over the gutter of the building. The construction was causing serious water lagging problem, causing nuisance to the locality and it was an illegal construction. The suit of the plaintiff came to be decreed and, therefore, both the owner of the property i.e. original defendant No.2 has filed his appeal so also the BMC. Counsel Mr.Sakhare,

appearing for the BMC, pointed out that in the appeal filed by the owner there was a delay of 207 days. The application for condonation of delay of the owner was allowed by this court after hearing both the parties by order dated 20th June 2005. The person who was the respondent in that appeal challenged that order before the Supreme Court by filing a SLP. But the SLP came to be dismissed. Mr.Sakhare, therefore, contended that since in one appeal of the party who was directly interested in the matter the delay has been condoned by this court, then looking to the nature of the case and the action taken by the BMC, the delay is required to be condoned.

. To support his contentions, Mr.Sakhare has relied upon the following three judgments reported in :-

**AIR 1996 SC 1623 [State of Haryana v. Chandra Mani]**

**JT 1998 (6) SC 242 [N.Balakrishnan v. M. Krishnamurthy]**

**AIR 1996 SC 2750 [Special Tehsildar, Land Acquisition Kerla v. K.V.Ayisumma]**

Mr.Sakhare pointed out that in all these aforesaid three judgment, the Supreme Court has adopted liberal attitude where the applications for condonation of delay were made by the State. Mr.Sakhare for the BMC contended that what applied to the State Machinery also equally applies to the BMC.

3. The learned counsel Mr.Anney appearing for Respondent No.1/original plaintiff strongly opposed this application for condonation of delay on the ground that the explanation given in the application can neither be treated as reasonable nor satisfactory. He read para 3 of the application and contended that even according to this application, the BMC applied for certified copy only after coming to know about the appeal filed by the original defendant NO.2 and all the explanations given are subsequent to that period. Therefore, when the application for certified copy came to be filed much after the period of limitation and much after filing of the appeal by the owner/defendant No.2 in which there was delay

of 207 days, then the explanations given could not be treated as reasonable nor satisfactory, which according to him, are requirements as laid down by the Supreme Court in **AIR 1998 SC 2276 [P.K. Ramchandran v. State of Kerala]**. Mr.Anney also contended that merely because the delay has been condoned in respect of the appeal filed by the original defendant No.2 cannot be a circumstance or ground for condonation of delay because right of the defendant No.2 and the authority of the BMC in this case are two different questions and, the criteria applied to the order in condoning the delay in the appeal of defendant No.2, cannot apply to the BMC.

4. It is to be noted here that the counsel for the original defendant No.2, who is supporting the case of the BMC, contended that the delay should be condoned because it is for the BMC to remove the encroachments particularly which are illegally constructed on the gutters meant for public drainage system.

5. I have given my anxious consideration to the submissions made by the respective counsel. It is true that the explanation given about the

delay is subsequent to the expiry of the period of limitation and after coming to know about the filing of the appeal by Respondent No.2. But only question that is involved, according to me, in this matter is, looking to the nature of respective claims of the plaintiff on one hand and the defendant BMC and the original Defendant NO.2 on the other hand and also looking to the public interest involved in removal of the illegal structures and also looking to the fact that the appeal of original defendant No.2 is due for admission, if one appeal is admitted, then BMC will be there as a respondent in the appeal of original defendant No.2.. Therefore, looking to the provisions of Section 41 Rule 22 of the CPC which provides as under :-

> "O.41 R.22 :- Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also stated that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross objection] to the decree which he could have taken by way of appeal...."

This provision though applies to the right of the parties to file cross objection can be best utilised by the BMC in the appeal filed by the original defendant No.2. Therefore, this is a case where the BMC gets right to challenge the findings of the trial Court even as respondent in the other appeal. If the appeal of original defendant No.2 was not there before me then the application for condonation of delay was required to be considered on its own merits. But looking to the fact that other appeal filed by original defendant No.2 is thereon record where the BMC is also the party and, the BMC was also the main contesting party, then considering the liberal attitude adopted by the Supreme Court in the three case relied upon by Mr.Sakhare, delay is required to be condoned as being reasonable in the circumstances of the case and on the basis of the Supreme Court's judgment relied upon by Mr.Sakhare.

5. In the application filed by the original defendant No.2 for condonation of delay costs of Rs.1000/- was imposed by me. Here looking to the delay I pass the following order :-

:ORDER:

The civil application is allowed.

Delay is condoned subject to payment of costs of Rs.5000/- [Rupees Five thousand only]. Payment of costs is a condition precedent. Costs to be paid within two weeks from today.

Put up the matter for admission after two weeks.

**[D.G.DESHPANDE,J]**